

this Order. Therefore, the Appeals Board adopts the Administrative Law Judge's findings and conclusions as if specifically set forth in this Order.

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.¹

As found by the Administrative Law Judge, the Appeals Board finds the evidence contained in the preliminary hearing record, at this stage of the proceedings, supports the conclusion that respondent did not have the right of control over the claimant to establish an employee/employer relationship. This conclusion is supported by the fact that claimant and respondent entered into a contract on June 17, 1998, with the specific intent to create a relationship between respondent and claimant as an independent contractor and not an employee/employer relationship. Claimant was required to provide his own truck and pay all of his expenses. When respondent had a delivery for claimant to make, the only instructions respondent provided claimant was the serial number of the camper claimant was to pick up at the manufacturer and the location in the United States for the delivery of the camper. Respondent did give claimant a suggested route to use, but claimant also could use another route at his discretion. Claimant was paid by the "loaded mile" and not by the hour or by the week. Respondent paid claimant a gross amount per trip and made no deduction for federal or state taxes. At the end of the year, respondent provided claimant with a 1090 form representing the gross amount respondent had paid claimant for the year instead of an employee's W-2 form. Claimant could hire another driver to complete a delivery with the only requirement that the substitute driver register with the respondent. Claimant was not required to take every delivery offered by the respondent, but could, at his discretion, refuse or accept the offered delivery job. The Appeals Board finds that claimant, being under little or no supervision or control by respondent, and having only to be concerned with the final result, i.e., the delivery of the camper, was not an employee, but instead an independent contractor.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's August 31, 1999, preliminary hearing Order, wherein the claimant was found to have failed to prove he was an employee of the respondent, should be, and it is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS

¹ See McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994); Falls v. Scott, 249 Kan. 54, 815 P.2d 1104 (1991); and Anderson v. Kingsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

Jerry E. Driscoll, Russell, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director